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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ITEL CONTAINERS INTERNATIONAL CORP.;
GENSTAR CONTAINER CORP.; FLEXI-VAN LEASING, INC.;
INTERPOOL LIMITED; TRANSAMERICA ICS INC.;
and NAUTILUS LEASING SERVICES, INC.,
Petitioners,

VS.

M/V C.C. SAN FRANCISCO and
CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTION PRESENTED

Under 46 U.S.C. § 971, have container lessors "furnished" containers to a vessel, so as to create a maritime lien for container charges, if the containers were used aboard that vessel, although the containers were not limited to use exclusively aboard that particular vessel?

LIST OF PARTIES

Petitioners—Container Lessors

A. Itel Containers International Corp.

B. Genstar Container Corp.

C. Flexi-Van Leasing, Inc.

D. Interpool Limited

E. Transamerica ICS Inc.

F. Nautilus Leasing Services, Inc.

All Petitioners are corporations. Pursuant to Supreme Court Rule 28.1, the parent companies, subsidiaries, and affiliates of each Petitioner are listed in Appendix A.

Respondents

A. M/V *C.C. San Francisco—In rem*

B. Char Yigh Marine (Panama) S.A.—Claimant on behalf of M/V *C.C. San Francisco*

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CHAR YIGH MARINE (PANAMA) S.A.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit, issued in this proceeding on January 20, 1987 (as amended February 5, 1987).

OPINIONS BELOW

1. The opinion of the Ninth Circuit Court of Appeals is reported *sub nom. Foss Launch & Tug Co. v. Char Ching Shipping U.S.A.*, 808 F.2d 697 (9th Cir. 1987) and is attached as Appendix B hereto. The Order of the Ninth Circuit Court of Appeals denying the petition for rehearing, filed April 23, 1986, ordered not for publication, is attached as Appendix C hereto.

2. The opinion of the United States District Court for the Central District of California is reported *sub nom. Flexivan Leasing, Inc. v. M/V C.C. San Francisco*, 628 F. Supp. 1077 (C.D. Cal. 1987) and is attached as Appendix D hereto.

JURISDICTION

Invoking federal admiralty jurisdiction under 46 U.S.C. § 1333(1), Petitioners asserted maritime liens against Respondent vessel *C.C. San Francisco* in the United States District Court for the Central District of California. On August 23, 1985, the District Court granted Petitioners' motions for summary adjudication establishing their right to maritime liens.

Respondents appealed to the United States Court of Appeals for the Ninth Circuit. On January 20, 1987, the Ninth Circuit (Judges Goodwin and Wallace in the majority, and Judge Anderson dissenting) reversed the District Court and denied Petitioners' right to the liens. On February 13, 1987, Petitioners requested a rehearing or rehearing *en banc*. On April 23, 1987, the Ninth Circuit denied Petitioners' request for rehearing or rehearing *en banc*.

This Court has jurisdiction to review the decision of the Ninth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

STATUTE IN ISSUE

The statute in issue, 46 U.S.C. § 971, the "Lien Act", reads:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

STATEMENT OF THE CASE

These are consolidated cases filed by Petitioners ("Container Lessors") against the vessel *CC San Francisco* (the "Vessel"). An ocean carrier called "CC Line" or "Char Ching Line" chartered and operated a fleet of six ships in the trans-Pacific container service between ports in the Far East and the United States. One of those ships was the *CC San Francisco.* The Vessel was specially designed for carrying cargo in containers, and during her service with CC Line carried only containerized cargo.

Each Container Lessor separately leased cargo containers to CC Line. The containers were delivered to CC Line at different times in a variety of locations. The containers are substantially uniform in design and construction (of 20 foot and 40 foot lengths), are essentially interchangeable, and are designed for use in intermodal transportation related to ocean carriage. Once CC Line took delivery of the containers, CC Line (in accordance with normal container shipping practice) had authority to use the containers aboard any of the vessels operating in its trans-Pacific service, and in related shoreside transport. One or more of each Container Lessor's containers was actually used aboard the Vessel for the transport of ocean cargo.

CC Line failed to pay container hire and other charges for use of the containers. Each of the Container Lessors instituted suit and asserted maritime liens against the Vessel to collect the charges owed in connection with containers actually used aboard the Vessel. Char Yigh Marine (Panama) S.A. appeared in the actions as the Vessel's owner and challenged the right of the Container Lessors to assert maritime liens against the Vessel.

The District Court concluded upon cross motions for summary adjudication that Container Lessors were entitled to maritime liens against the Vessel for charges relating to containers carried on the Vessel. Char Yigh appealed. In an opinion filed January 20, 1987, the Ninth Circuit (Judges Goodwin and Wallace in the majority, and Judge Anderson dissenting) reversed the District Court and denied the liens on the ground that the containers were not "furnished" to the Vessel within the meaning of 46 U.S.C.

§ 971, notwithstanding that the Ninth Circuit found the containers to be "necessaries" within the meaning of the statute.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

International trade depends upon ocean shipping. Ocean shipping is primarily accomplished today by loading goods into intermodal cargo containers, which are then loaded onto ships and taken to ports throughout the world.

The effect of the "container revolution" on international trade has been rapid and dramatic. See generally, Quinn, "*Ocean Container Leasing and Maritime Liens: An Example of Flexibility in U.S. General Maritime Law,*" 18 J. Mar. L. & Com. 1, at pp. 2-8 (1987). As stated in Simon, "*The Law of Shipping Containers,*" 5 J. Mar. L. & Com. 507, 507 (1974):

> "One of the most important technological developments in the transportation of goods by sea since steam replaced sail is the advent of the 'container revolution.' This radically novel concept of transferring, handling, stowing, discharging and delivering hundreds of packages simultaneously and mechanically by means of large reusable permanent metal containers, container ships, special container handling equipment and container terminals is so efficient a labor saving device that it has already, to a large extent, altered conventional methods of shipping large numbers of packages individually."

Because of the overwhelming economic advantages of containerized transport, what was "radically novel" in 1974 now dominates international shipping. By 1979, more than 60% of the world's ocean commerce had been containerized, and in 1983 there were almost 46 million TEU (twenty foot equivalent unit) container movements. Quinn, *id.* at 4. By 1985 that had increased to 55 million TEU container movements. *Containerization International Yearbook*, 1987 (at p.7).

Container lessors have played an integral part in this development:

> "Standardization of containers, growth in international demand for intermodal equipment, and the lack of geographic balance and worldwide trade led directly to the emergence of container lessors to provide necessary equipment to ocean carriers. Lessors are able to provide equipment when and where needed, and leasing equipment frees the ocean carrier from a significant capital investment. Satistics show that by the late 1970's, approximately one-half of the marine containers and chassis in use throughout the world were leased from lessors rather than owned by the steamship operators . . . By 1982, more than 80 percent of American containers were leased, and less than 20 percent were carrier owned." (Quinn, *id.* at 7-8.)

This Petition concerns an issue critical to the ocean shipping industry in general and to the container leasing industry in particular: whether container lessors will continue to have maritime liens on vessels for container charges when their leased containers are used aboard those vessels. Although recognizing that containers are "necessary" for containerized shipping operations, the Ninth Circuit denied the liens on the ground that each container had not been designated for use exclusively on the *C.C. San Francisco* when each container was leased out. The Ninth Circuit opinion, however, primarily relied upon an incorrect reading of *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L. Ed. 97 (1920) and upon an incorrect reading of the Lien Act itself. Further, the Ninth Circuit's construction of the Lien Act directly conflicts with decisions and principles enunciated by courts in other circuits, in particular the recent *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Equilease Corporation v. M/V Sampson*, 793 F. 2d 598 (5th Cir., 1986), cert. den. ____ U.S. ____, 93 L.Ed 2d 575, 107 S.Ct 570 (1986). This is especially significant in view of the paramount policy for national uniformity in the application of federal maritime law.

If allowed to stand, the Ninth Circuit opinion would deny to container lessors their most important (and often their only practical) security in leasing their containers, which are carried by their lessee ship operators to the four corners of the globe.

Furthermore, the split among the Circuits places vessel owners and container lessors alike in a state of confusion, their lien rights depending upon the fortuity of the vessel calling at a port within the jurisdiction of a court favorable to their position on this issue.

I

THE NINTH CIRCUIT MISCONSTRUED SUPREME COURT PRECEDENT AND THE LIEN ACT IN INTERPRETING THE "FURNISHING" REQUIREMENT OF 46 U.S.C. § 971

The issue in this case is the proper construction of the words "[any] person furnishing . . . necessaries . . . to any vessel . . . " in 46 U.S.C. § 971. When leased out, the containers were not contractually allocated for use only on the *C.C. San Francisco,* although they were in fact used aboard that Vessel at identifiable times on identifiable voyages. If "furnishing . . . to any vessel" in § 971 requires the Container Lessors to have allocated and limited each container for use on the *C.C. San Francisco* only, the Container Lessors have no lien. Container lessors submit that the Ninth Circuit misconstrued the "furnishing" requirement of § 971 to require such allocation and limitation.

A. The Ninth Circuit Misconstrued the Piedmont Case to Require Allocation in Order to Satisfy the "Furnishing" Requirement of § 971.

The Majority Opinion in the Ninth Circuit, over a strong dissent, and although acknowledging this to be a close question, narrowly construed "furnishing" under § 971 to require allocation of each container for exclusive use aboard one vessel. In coming to this admittedly "restrictive interpretation" of "furnishing" (808 F.2d at 701), the Majority Opinion relied almost entirely upon *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L. Ed. 97 (1920). However, the facts of the *Piedmont* case are such that the holding does not reach the issue of allocation, and the Majority Opinion below erred in reading *Piedmont* as if it did.

In *Piedmont* a coal supplier (the lien claimant) delivered coal to a company for use both in its shoreside factories and on its fishing boats. The company commingled the coal with its general shoreside stockpile, and then supplied the boats from that stockpile. No determination was made of how much of the supplier's coal was used by the factories and how much by the boats (let alone by any particular boat). The company failed to pay for the supplier's coal. The supplier then asserted a lien on the boats for the unpaid amounts. The Supreme Court denied the lien.

The holding in *Piedmont* did not decide the issue presented in this case. In *Piedmont* the supplier simply could not prove that *any* of its coal was used by *any* particular ship or by any of the ships at all. The supplier had no lien even if allocation were *not* required, for the supplier could not prove that any of its coal had been used on any particular vessel. All of the coal may have been used for strictly non-maritime purposes.

In contrast, it is undisputed that in this case Container Lessors can prove exactly which of their containers were aboard the *CC San Francisco* on any given voyage—manifests and similar records list the containers the Vessel carried. Thus—unlike in *Piedmont*—the Court in this case must decide whether allocation to one particular vessel is a prerequisite for a lien. *Piedmont* is factually distinguishable from this case, and the Majority Opinion below erred in reading *Piedmont* as having held dispositively on the issue whether allocation is required.

Since the Supreme Court in *Piedmont* did not have to reach the issue of allocation, the Majority Opinion below was predicated upon dicta, not the holding of the case. The dicta of the *Piedmont* decision is, however, inconclusive on this point. A leading maritime text, Gilmore and Black, *The Law of Admiralty*, (2d Ed. 1975), § 9-36, p. 661, had this to say about the *Piedmont* decision:

> "As was his habit, Justice Brandeis in the course of a moderately long opinion multiplied the facts that might be considered significant . . . By the time he had finished, not even the purest legal genius could have declared which of these multiple facts, or which combination of them, had

> resulted in the denial of lien. Consequently the case, in its specific context of supplies furnished to a fleet of ships, has ever since proved a slippery precedent to the counsel and lower court judges who have wrestled with it. The Piedmont case is all things to all men and is regularly cited on both sides on every case in which it is relevant . . ."

Indeed, the confusing nature of the dicta in *Piedmont* is illustrated by the fact that both the Majority Opinion and the Dissenting Opinion below rely upon it. The Dissenting Opinion (at 808 F.2d 704) cited the following language in *Piedmont* in support of the position of Container Lessors:

> "Likewise, the fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract [citations omitted], each vessel so receiving supplies may be made liable for the supplies furnished to it." (254 U.S. at 10-11, 41 S.Ct. at 4, 65 L.Ed. at 101.)

Container Lessors acknowledge that *Piedmont* also contains dicta that can be read to imply that allocation to particular vessels is necessary. The Majority Opinion below, however, distorted and misapplied the language in *Piedmont,* basing its restrictive reading of § 971 on the remark in *Piedmont* that maritime liens are *stricti juris.* (808 F.2d at 702.) That remark in *Piedmont* was included in the context of a general discussion of the nature of maritime liens. (*Piedmont, supra,* 254 U.S. at 12-13, 41 S.Ct. at 4, 65 L.Ed. at 102.) The *stricti juris* principle of statutory construction, however, applies only to the creation of new liens, not to consideration of the application of established liens, like those for "necessaries" (which the Majority Opinion below found the containers to be):

> "It is abundantly clear that new types of maritime liens may not be created; however, it appears equally clear that the doctrine of *stricti juris* does not affect the mechanics of the imposition of traditionally recognized varieties of maritime

liens. Provision of necessaries for a vessel is a long recognized basis for a lien . . ." *Atlantic & Gulf Stevedores v. M/V Grand Loyalty,* 608 F.2d 197, 201 (5th Cir. 1979).

Thus the Majority Opinion below misconstrued the *Piedmont* decision in significant respects.

B. The Language of the Lien Act Does Not Mandate Allocation to Satisfy the "Furnishing" Requirement

Aside from the *Piedmont* case, the Majority Opinion below relied upon the language of § 971. Nothing in the language of § 971, however, requires allocation to satisfy the "furnishing" requirement. The Majority Opinion below inferred that Congress, by the use of the "active" voice in the phrase " . . . person furnishing . . . necessaries . . . to any vessel . . . " expressed an intent that a maritime lien requires "active forethought or advance identification of particular vessels." (808 F.2d at 701.) Container Lessors submit that such an inference is unjustified. There is no legislative history to support the inference. Even if the statute could be read to require "active forethought" with regard to the "furnishing" issue, nothing in the statute suggests that "active forethought" translates into "advance identification of particular containers to particular vessels." Container Lessors submit that the Dissenting Opinion is correct in stating:

> " . . . The active and not passive language used in the statute is not a distinction which supports the inference that Congress intended a restrictive reading when viewed against the purposes of the Act . . .
>
> "The purpose behind the Act, as amended in 1971, was as a matter of equity to protect suppliers who in good faith furnish necessaries to a vessel . . . If the purpose of the Act is to be fulfilled, the contruction of the 'furnishing . . . to any vessel' requirement should not be a restrictive one. The majority's restrictive interpretation is contrary to the purpose Congress expressed when it amended the Act. In this, the majority places reliance for its holding upon the fact that the verb "to furnish" is active and not passive. I find this distinction to be of little weight. While use of the active voice may create an inference of Congressional intent, such an

inference should be decidedly subordinate to Congress' stated purpose. [Citation omitted.]" (808 F.2d at 703-4.)

II

THE NINTH CIRCUIT'S INTERPRETATION OF THE "FURNISHING" REQUIREMENT OF 46 U.S.C. § 971 CONFLICTS WITH THE INTERPRETATION OF THAT STATUE BY OTHER CIRCUITS

The Majority Opinion below applied a narrow, outdated view of maritime lien law that conflicts both substantively and in approach with the decisions of courts in other Circuits. This is particularly significant in view of the paramount policy for national uniformity in the application of federal maritime law. *See, e.g., St. Hilaire Moye v. Henderson*, 496 F.2d 973, 980 (8th Cir. 1974), cert. den. 419 U.S. 884, 42 L.Ed 2d 125, 95 S.Ct 151 (1974).

Whether the Lien Act requires allocation of necessaries to one particular vessel is strictly a question of proper construction of the Act, namely whether to construe the "furnishing" requirement narrowly or to interpret it practically and in accordance with modern shipping practices. In contrast to the Majority Opinion below, modern courts have consistently applied a practical construction to the "furnishing" requirement.

Before the decision of the District Court in this case, two other District Courts recently decided the precise issue in this case in favor of container lessors: *Nautilus Leasing Services, Inc. v. M/V Cosmos,* 1983 A.M.C. 1483 (S.D.N.Y. 1983); *Transamerica ICS, Inc. v. M/V Panatlantic*, 1984 A.M.C. 489 (S.D. Fla. 1983). In each case the District Court recognized the maritime lien of container lessors for unpaid container charges without requiring allocation of leased containers to a particular vessel. The District Court in the *Transamerica* case specifically considered this point:

> "Furthermore, for purposes of creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that the container be delivered directly to the vessel, be sold rather than leased, *or be earmarked for a particular vessel.*" [Emphasis added.] 1984 A.M.C. at 490.

Additionally, the proper approach to construing "furnishing" in § 971 of the Lien Act was analyzed in detail by the Fifth Circuit *en banc* in its recent decision in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986), cert. den. ____ U.S. ____ 93 L.Ed 2d 575, 107 S.Ct 570 (1986). In that case the issue was whether insurance was "furnished" to a vessel and was a "necessary" such that the insurer could claim a maritime lien on the vessel for the unpaid insurance premium. The Fifth Circuit unanimously agreed that the insurance was "furnished" to the vessel and that the "furnishing" requirement should be construed in a practical manner, rather than narrowly or technically. The Court stated:

> "Equilease argues that the concept of 'furnishing' requires a physical delivery to the vessel. Equilease's heavy reliance on a literal interpretation of the word 'furnishing,' however, is misplaced. To read 'furnishing' as requiring an actual thing to be physically delivered to the vessel would foreclose any intangible services from ever being held necessaries under section 971 . . .
>
> * * *
>
> "We find no persuasive reason to read the term 'furnishing' so narrowly as Equilease would urge. The [Lien Act] was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation. We hold that 'furnishing' in section 971 does not necessarily require an actual delivery of something to the vessel." (793 F.2d at 603.)

The *Equilease* approach to the proper construction of the Lien Act—practical, not restrictive—is the consistent modern view. Modern courts construing the language of § 971, especially after the 1971 Amendment to the Act, have essentially abandoned the former restrictive attitude toward construction of that section. In addition to the cases cited above, a multitude of courts in recent years have broadly construed the Lien Act and have recognized liens unimagined seventy years ago. For example, such expenses as printing and advertising (which are obviously not physically delivered to the vessel by the supplier) now may give rise to a

maritime lien. *Colonial Press of Miami, Inc. v. The Allen's Cay,* 277 F.2d 540 (5th Cir. 1960); *Stern, Hays & Lang, Inc. v. M/V Nili,* 407 F.2d 549 (5th Cir. 1969). *See also Payne v. S.S. Tropic Breeze,* 423 F.2d 236, 241 (1st Cir. 1970), cert. den. 400 U.S. 964, 27 L.Ed 2d 383, 91 S.Ct. 363 (1970), which broadly construed the word "necessaries" in § 971 and stated: "We think that a broad interpretation is more consistent with the purpose of the Act than the earlier, narrow approach."

If allowed to stand, the Majority Opinion below will lead to inconsistent application of maritime lien law depending upon the port in which a container vessel happens to dock. A container lessor may be unable to enforce a claimed maritime lien against a vessel calling at Los Angeles, but may be able to enforce the claimed lien against that same vessel if it calls, for instance, at New Orleans. This anomaly requires resolution by this Court.

III

THE SUPREME COURT SHOULD REEVALUATE, UPDATE, AND CLARIFY THE *PIEDMONT* DECISION IN VIEW OF THE STATUTORY, CASE LAW, AND ECONOMIC CHANGES SINCE THE PIEDMONT CASE WAS DECIDED

Since *Piedmont* was decided in 1920 the Lien Act has been amended twice to broaden the protections of suppliers of necessaries. As described above, modern courts have construed the Lien Act in a practical, not restrictive, manner to effect Congress's purposes in amending the statute. And an economic revolution in shipping has recently occurred. For these reasons the Supreme Court should take this opportunity to reevaluate, update, and clarify the *Piedmont* decision as it may now apply to liens for container charges.

A. Since Piedmont the Lien Act Has Been Twice Amended to Broaden The Protections of Suppliers, Which Has Changed the Basis Upon Which Piedmont Was Decided

The *Piedmont* case was decided under the 1910 version of the Lien Act. Since 1910 Congress has amended the Lien Act twice, in 1920 and again in 1971. Each time the purpose of the amendment was to make it easier and more certain for suppliers

of necessaries to protect their interests by making maritime liens available to them. In 1920 Congress amended the Lien Act to expand the scope of "necessaries". *See* Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975) § 9-34, at p. 657. The 1971 Amendment also significantly broadened suppliers' lien rights. The Ninth Circuit itself recognized the broad modern approach to maritime liens consonant with the 1971 Amendment in *Farwest Steel Corp. v. Barge Sea-Span 241*, 769 F.2d 620, 623 (9th Cir. 1985):

> "Our analysis must proceed under the Lien Act's presumption in favor of materialmen for all repairs, supplies, and other necessaries ordered. [Citations omitted.] This presumption was enhanced in 1971 when Congress deleted the requirement that materialmen inquire about the existence of any no-lien clauses before furnishing supplies to a contractor. *See Atlantic & Gulf Stevedores v. M/V Grand Loyalty*, 608 F.2d 197, 201-2 (5th Cir. 1979) (legislative history of 1971 amendment requires a liberal application of Lien Act); Ray, *Maritime Contract Liens*, 47 Tul.L.Rev. 587, 591 (1973)."

Indeed, the Fifth Circuit has determined that the 1971 Amendment to the Lien Act altered the applicability of the *stricti juris* approach upon which the Majority Opinion below relied.

> "We are of the further opinion that § 971 et seq. is not to be viewed through the constricting glass of *stricti juris*, or as some would suggest, *strictissimi juris*. We view the legislative history of these sections to mandate a more liberal application than that which existed prior to the 1971 amendments to the Maritime Lien Act." *Atlantic & Gulf Stevedores v. M/V Grand Loyalty*, 608 F.2d 197, 201 (5th Cir. 1979).

Given these changes in the Lien Act, it is time for the Supreme Court to reevaluate, update, and clarify the proper interpretation of § 971 of the Act, lest the 1910 version of the Act defeat the subsequent amendments through the application (or misapplication) of the *Piedmont* decision to post-amendment cases.

B. Requiring Allocation Leads To Serious Economic Inefficiencies

The effect of the Majority Opinion below will be detrimental to maritime commerce. To protect their lien rights container lessors would have to limit the use of specific containers to a specific vessel. The efficient use of containers is based upon their interchangeability and the ease of discharging them from the vessel, loading others, and leaving before the discharged containers are unstuffed. The Majority Opinion below would eliminate that economy and require the vessel to wait while its "specified" containers are unstuffed inland, restuffed with new cargo, and reloaded aboard the vessel. The speed of cargo movement would be reduced, and the cost of cargo movement correspondingly would increase. Alternatively, the ship operator would have to lease multiple sets of containers specified for each ship. The interchangeability of containers—their essential efficiency—would be lost. This essential efficiency was described and recognized by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 269-271, 53 L.Ed. 2d 320, 336-7, 97 S.Ct. 2348 (1977).

Further, the Majority Opinion below will limit the availability of leased containers, particularly to smaller companies who cannot afford the capital investment to buy their own containers, because without maritime lien rights container lessors will be more reluctant to lease to them.

The Majority Opinion below in fact recognized that "modern business conditions" call for a broad rather than restrictive reading of the "furnishing" requirement. (808 F.2d at 703.) However, the Majority Opinion below, after quoting the District Court opinion in the *Piedmont* case, which also justified a broad interpretation of "furnishing" in part upon [then] modern business conditions, proceeded to reject that consideration and stated that "like the Supreme Court in *Piedmont*" they were not persuaded that modern business conditions justified a broader reading of § 971. (808 F.2d at 703.) However, the Supreme Court in *Piedmont* did not address the economic effect of its decision. The Majority Opinion below unfairly ascribed to the Supreme Court

in *Piedmont* a disdain for the economic effects of its decision that is nowhere to be found in the *Piedmont* opinion.

C. Requiring Allocation Leads To Illogical and Inconsistent Distinctions

To construe "furnishing . . . to any vessel" to require allocation of containers to one vessel only results in illogical distinctions among potential lien claimants. There is no substantive difference between the following two transactions: 1) A container lessor leases five containers to Steamship Company *A* and allocates each one for use on only one of five specific vessels; and 2) The same container lessor leases five other containers to Steamship Company *B* for use on five identifiable vessels, without allocating each one to one particular vessel, but the shipowner uses each container aboard one vessel. In each case the container lessor provided five containers to the five vessels, and in each case the vessels benefitted to the same extent by using the containers. There is no logical distinction between these two transactions. Yet the Majority Opinion below would consider only the first group of containers to have been "furnished" and would grant a lien to the container lessor in the first case, but not in the second.

CONCLUSION

This Petition addresses an issue of national (indeed international) importance. The Ninth Circuit decided that issue incorrectly, based upon a misreading of Supreme Court precedent and the Lien Act, and upon the application of a narrow, outdated approach to construing the Act, in conflict with the rulings of courts in other Circuits and with economic realities. The *Piedmont* decision was rendered in 1920, based upon the 1910 version of the Lien Act. It is high time for the Supreme Court to modernize and clarify the *Piedmont* decision to reflect the dramatic statutory, case law, and economic changes since the Supreme Court last had the opportunity to address the issue.

Container Lessors therefore request that the Supreme Court grant this Petition for a Writ of Certiorari.

Dated: June 19, 1987

Respectfully submitted,

GRAHAM & JAMES
ERIC DANOFF

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(Appendices follow)

Appendix A

(1) Itel Containers International Corp.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: Itel Corporation

Subsidiaries (non-wholly owned):
Aitel Container do Brasil S/C Ltds.
Itel Container International GmbH
Itel Container S.r.l.
SSI Containers Ltd.
SSI Navigation of Liberia II, Inc.

Affiliates:
SSI Sea I, Inc.
SSI Sea II, Inc.
SSI Sea III, Inc.
SSI Sea IV, Inc.

(2) Genstar Container Corporation's Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: General Electric Credit Corporation

Subsidiaries (non-wholly owned): Genstar Container International *SARL*

Affiliates: None

(3) Flexi-Van Leasing, Inc.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: Flexi-Van Corporation

Subsidiaries (non-wholly owned):
Flexi-Van Leasing SRL

Affiliates: Flexi-Van Philippines, Inc., a joint venture

(4) Interpool Limited's Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: TBG Holdings, N.V.

Subsidiaries (non-wholly owned): None

Affiliates:
TGB Europe, N.V.
TGB Inc.
Vulcan Industrial Services

(5) Transamerica ICS Inc.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Parent: Transamerica Corporation

Subsidiaries (non-wholly owned):
Transamerica ICS do Brasil S/C Ltda.
Transamerica ICS GmbH
Transamerica ICS (HK) Ltd.
Transamerica ICS Limited
Transamerica ICS Pty. Ltd.

Affiliates: ICS Terminals (U.K.) Limited

(6) Nautilus Leasing Services, Inc.'s Parent, Subsidiaries (non-wholly owned) and Affiliates

Nautilus Leasing Services, Inc. has no Parent, Subsidiaries (non-wholly owned) or Affiliates.

Appendix B

Foss Launch & Tug Co., et al.,
Plaintiffs,
and
Transamerica I.C.S. Inc. and Nautilus
Leasing Services, Inc.
and
Flexi-Van Leasing, Inc.,
a corporation,
and
Itel Containers International
Corporation and Genstar
Container Corporation,
and
Interpool Limited,
Plaintiffs-Appellees,
v.
Char Ching Shipping U.S.A., Ltd.,
et al., Defendants,
and
Char Yigh Marine (Panama,) S.A. claimant of vessel M/V C.C. SAN FRANCISCO, her engines, boiler, tackle, appurtenances, furniture and fixtures, in rem, Defendant-Appellant.

No. 85-6351.
United States Court of Appeals,
Ninth Circuit.
Jan. 20, 1987.
As Amended Feb. 5, 1987.

Appeal from the United States District Court for the Central District of California.

Before GOODWIN, WALLACE and ANDERSON, Circuit Judges.

GOODWIN, Circuit Judge.

The only substantial question in this appeal is whether a lessor of container boxes to a company that operates a fleet of container ships can assert a maritime lien against a vessel pursuant to 46

U.S.C. §§ 971-975. The district court granted summary judgment for the lien claimant. We reverse.

The essential facts are not in dispute. Appellees leased containers to CC Line under a series of separate lease agreements. The containers were to be used by CC Line in connection with its transpacific shipping service between various ports in Asia and the United States. Under the lease agreements, containers were delivered to CC Line at different times in a variety of locations. The containers are substantially uniform in design and construction, and are treated by carriers as fungible. Some deliveries under the Flexivan agreements were apparently made to CC Line's own container yards that service its transpacific operations. The Transamerica, Nautilus, Genstar, and Itel leasing contracts, however, provided for the delivery of containers to CC Line at container manufacturing plants and at the lessor's own container depots. Once the CC Line took possession of the containers, CC Line had unrestricted authority to designate which containers would be placed aboard the particular vessels operating in its transpacific service.[1] The lease agreements likewise did not restrict the use of the leased containers to exclusive use in maritime transportation. These boxes are designed for intermodal transportation.

The vessel "CC San Francisco" entered CC Line's transpacific service in 1983. It was specially designed for carrying cargo packed in containers. One or more of each lessor's containers was actually used aboard the "C.C. San Francisco" for the transport of ocean cargo.

In late August, 1984, the vessel "C.C. San Francisco" was arrested in Los Angeles in an *in rem* maritime action by appellees. The registered owner of the vessel, "Char Yigh Marine (Panama) S.A.," thereafter appeared in district court and sought a post-seizure hearing to have plaintiffs-appellees justify their maritime lien claims. Cross-motions for summary judgment were

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[1] This practice is apparently consistent with the current industry practice with respect to containerization. Containers are leased in bulk lots so that they can be employed interchangeably or sequentially in the conveyance of freight by means of various modes of transport including ships, airplanes, railroads, and trucks.

filed with the district court and on August 20, 1985, the district court ruled in favor of plaintiffs' liens. The district court held:

> (1) that the plaintiffs' container leases with "CC Line" are maritime contracts; (2) that plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco" and are therefore "necessaries" within the meaning of 46 U.S.C. § 971; (3) that plaintiffs "furnished" containers to the "CC San Francisco" within the meaning of 46 U.S.C. § 971; (4) that plaintiffs have valid maritime liens for necessaries against the vessel "CC San Francisco" for all containers carried aboard that vessel; and (5), that the maritime lien encompasses all periods plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco," including incidental land use.

Flexivan Leasing, Inc. v. M/V C.C. San Francisco, 628 F.Supp. 1077, 1080 (C.D. Cal.1985).

Appellants raise a number of issues on appeal. The first issue is whether the district court had admiralty jurisdiction. Disputes involving the interpretation of contractual duties in maritime contracts can be proper subjects for resolution in admiralty. *Hinkins Steamship Agency, Inc. v. Freighters, Inc.,* 498 F.2d 411, 412 (9th Cir.1974) (per curiam) (contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, is subject to maritime law and falls under admiralty jurisdiction). We have no difficulty in following the cases which have found similar container leases to be sufficiently related to maritime transportation to support the extension of federal admiralty jurisdiction. *CTI-Container Leasing Corp. v. Oceanic Operations Corp.,* 682 F.2d 377, 380-81 (2d Cir.1982); *American President Lines, Ltd. v. Green Transfer & Storage, Inc.,* 568 F.Supp. 58, 60 (D.Or. 1983); *Integrated Container Service, Inc. v. Starlines Container Shipping, Ltd.,* 476 F.Supp. 119, 125 (S.D.N.Y.1979).[2]

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[2] We express no opinion on the effect of "incidental land uses" of containers employed in "inter-modal" freight conveyance, originating on maritime vessels, upon the proper boundaries of admiralty jurisdiction. We need not decide whether a creditor could permit maritime attachment of containers located far in the interior of the country even though

Of the remaining issues raised on appeal, each turns on an interpretation of the governing federal maritime lien statute, 46 U.S.C. § 971. That statute provides as follows:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

46 U.S.C. § 971 (1982).

A recent decision of this court, *Farwest Steel Corp., v. Barge Sea-Span 241,* 769 F.2d 620, 623 (9th Cir.1985), instructs that there are three requirements for the grant of a maritime lien under 46 U.S.C. § 971. A person lien claimant must have: (1) furnish[ed] repairs, supplies, or other necessaries, (2) to any vessel, (3) "upon the order of the owner of such vessel, or of a person authorized by the owner." 46 U.S.C. § 971.

The "necessaries" requirement presents no substantial difficulty. The term, in modern interpretations, has been expanded to encompass any item which is "reasonably needed for the venture in which the ship is engaged." 2 S. Friedell, S. Bellman, A. Jenner & J. Loo, *Benedict on Admiralty* § 37 at 3-27 (7th ed. 1986). *See also Farwest Steel Corp.,* 769 F.2d at 623 ("[t]he term 'necessaries' under section 971 refers to 'supplies which are necessary to keep the ship going' ").

The wide range of items that can be characterized as "necessaries" under the Act is exemplified by the result in *Equilease Corp. v. M/V Sampson,* 793 F.2d 598, (5th Cir.1986) (en banc). In *Equilease,* the court stated: "The term 'necessary' under the FMLA [Act] includes most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function .... What is a 'necessary' is to be determined relative to the requirements of the ship." *Equilease,* 793 F.2d at

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they may have been subject to the preference accorded maritime liens while aboard ship.

603 (citations omitted). The court's resulting conclusion was that "because insurance is essential to keep a vessel in commerce, insurance is a 'necessary' under 46 U.S.C. § 971." 793 F.2d at 604.

During all relevant periods of the operations of the "C.C. San Francisco," cargo containers of the type leased by appellees were more than reasonably necessary to the successful operation of the vessel. Although theoretically it might have been possible to convert the "C.C. San Francisco" from a container carrier to another type of cargo vessel, such transformation or modification was not attempted here. The vessel entered service in 1983 designed to transport cargo containers of the type supplied by appellees. It was engaged in container shipping throughout its time-charter period of operation by CC Line. We therefore hold that containers provided to the "C.C. San Francisco" under the leasing agreements were "necessaries" within the meaning of 46 U.S.C. § 971.[3] *Accord Transamerica ICS, Inc. v. M/V Panatlantic,* 1984 A.M.C. 489, 490 (S.D.Fla.1983) ("the Court is convinced that containers are 'necessaries' within the meaning of 46 U.S.C., sec. 971"); *Nautilus Leasing Services, Inc. v. M/V Cosmos, et al.,* 1983 A.M.C. 1483 (S.D.N.Y.1983) ("we have no difficulty holding that the containers in the instant case are 'necessaries' within 46 U.S.C., sec. 971").

The third requirement, that items be furnished to a vessel under the direction of an "owner" or "authorized person" can also be easily addressed. It is now well established that a bareboat time-charterer of a vessel holds sufficient legal authority over the management of the vessel to subject the vessel to maritime liens. *Gulf Trading & Transportation Co. v. M/V Tento,* 694 F.2d 1191, 1194 (9th Cir.1982), *cert. denied,* 461 U.S. 929, 103 S.Ct. 2091,

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[3] We note without deciding that proof of excess leasing of containers in relation to the capacities of a single vessel or fleet of vessels might undermine a materialman's claim to having furnished "necessary" items to a vessel *See, e.g., Bellingham Nat. Bank v. Oil Screw Pacific Horizon,* 587 F.Supp. 26 (W.D.Wash.1984) (materialman did not "furnish" a fishing net to a particular ship because the net was originally "furnished" for a different ship and then subsequently transferred to the liened ship).

77 L.Ed.2d 301 (1983). The 1971 amendments of the Federal Maritime Lien Act, *see* H.R.Rep. No. 92-340, 92nd Cong., 1st Sess. 1, 3, *reprinted in* 1971 U.S.Code Cong. & Admin.News 1363, 1365 were also partly intended to ensure that any person to whom the management of a vessel is entrusted will be presumed to have authority to procure necessaries and supplies which may give rise to maritime liens. 46 U.S.C. § 973; *Farwest Steel Corp.*, 769 F.2d at 623-24.

In this action, no extraordinary circumstances have been put forward to suggest that CC Line was not in fact entrusted with management authority over the "C.C. San Francisco" during relevant periods of its operation. Accordingly we hold that the appellees entered into container leases with a party adequately authorized by the owner of the vessel "C.C. San Francisco" to support a grant of maritime liens under 46 U.S.C. § 971.

The second requirement, that the lien claimant be a person "furnishing . . . to any vessel," presents a closer question. Its resolution turns on the intent of Congress in drafting a form of the verb "to furnish" into the text of 46 U.S.C. § 971. There is no doubt that containers furnished by the lien claimant were carried on one of a group of vessels intended to carry such containers. The question is whether the lien claimant furnished the attached containers "to" that vessel under the Act. In other words, is it a condition precedent to a lien that containers which have been leased to managers of a fleet of container vessels also must have been specifically set apart for use on the particular vessel against which a lien is asserted?

The "furnishing" question has recently been faced in two other circuits. Apparently in an effort to accommodate the professed expectations and needs of the shipping industry, each court applied a broad construction of "furnishing." In the most recent decision, the Fifth Circuit noted the closeness of the question but nevertheless concluded: "We find no persuasive reason to read the term 'furnishing' . . . narrowly. . . . The statute was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation." *Equilease*, 793 F.2d at 603. Similarly, a Florida district court noted that "for purposes of

creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that the container be delivered directly to the vessel, be sold rather than leased, or be earmarked for a particular vessel." *Transamerica ICS,* 1984 A.M.C. at 490.

We respect the reasoning of these courts. But we are reluctant to subject the heretofore relatively certain law of maritime liens to the uncertainty and flux of developing shipping industry practices when the controlling precedents governing interpretation of the Act favor a narrow construction of the "furnishing" requirement.

We begin with the plain meaning of 46 U.S.C. § 971. Stripped to its essentials, the statute states that "[a]ny person furnishing . . . necessaries . . . to any vessel. . . . " We note initially that the verb "to furnish" as found in the statute appears in the form of the active and not the passive voice. For example, the statute could have been drafted to state that "necessaries that *are furnished* to any vessel" can support a maritime lien. In such circumstance, it would have been possible for even the fortuitous application or use of necessaries by a vessel to create a valid maritime lien against a vessel. In creating a preferred class of secured creditors, Congress chose not to draft the Act in the passive voice and we think the correct inference is that Congress intended "furnishing" to require active forethought or advance identification of particular vessels in relation to "necessaries" supplied.

This inference is consistent with the historical vessel-specific character of a maritime lien. Under the law of maritime liens, a vessel is considered to be a distinct entity responsible only for its own debts. *Riffe Petroleum Co. v. Cibro Sales Corp.,* 601 F.2d 1385, 1389 (10th Cir.1979). As a consequence, maritime liens are enforced through in rem proceedings, *see* Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims, Fed.R.Civ.P., and jurisdiction lies only in the district where the vessel is located.

Our restrictive interpretation of "furnishing" is supported by longstanding precedents interpreting 46 U.S.C. § 971. *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920), and its progeny are particularly

apposite to this action. In *Piedmont*, the Supreme Court denied maritime liens sought against vessels that had received coal which had been sold to the vessels' owner on credit. The defect was not "in failure to show that the coal was furnished *to* the vessels but in failure to prove that it was furnished *by* the libelant." *Piedmont*, 254 U.S. at 13, 41 S.Ct. at 5.

Appellees contend that *Piedmont* represents a case driven by a simple failure of proof as to the amounts of coal actually received by each vessel in a group of vessels supplied with coal. However, it is clear that *Piedmont* has not been interpreted in such a limited fashion. In *Bankers Trust Co. v. Hudson River Day Line*, 93 F.2d 457 (2d. Cir.1937), maritime liens were denied a supplier of oil who had delivered oil to a buyer's barges under a single bulk supply contract. In denying the lien, the *Bankers Trust* court understood the holding of *Piedmont* on the "furnishing" question to require that "supplies, though delivered in mass to the owner of the fleet under a single contract, [must be] expressly ordered by the owner and delivered to him by the supplyman for the use of *named vessels in specified portions.*" *Id.* at 458 (emphasis supplied by Second Circuit) (*quoting The American Eagle*, 30 F.2d 293, 295 (D.Del.1929)).

In *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), the Supreme Court decided to grant a maritime lien only after distinguishing *Piedmont* in the following manner: "In the instant case, the oil was supplied exclusively for the vessels in question, was delivered directly to the vessels and was so invoiced; and there was nothing in the general contract to the effect that the supplies were to be furnished [to some degree] upon the credit of the vessels." *Id.* at 277. Thus, the holding of *Dampskibsselskabet* should be read to encompass only those cases in which a materialman has taken care, in an ascertainable manner, to designate the items or services he contracts to provide for use on the particular vessel against which a lien is subsequently sought. *See also The Everosa*, 93 F.2d 732, 735 (1st Cir.1937) (lien granted) ("In the present case, the master of a particular vessel requisitioned for coal to the coal company; it was sent to a particular vessel, loaded on her by the coal company's representative and paid for by her master"); *Carr V. George E.*

Warren Corp., 2 F.2d 333, 334 (4th Cir.1924) (lien granted) ("In this case, the coal was actually purchased on the credit of the steamers, billed to the steamers, and used by them.")

Piedmont was also responsible for the incorporation of the *stricti juris* principle, long a feature of the law of maritime liens, *see Vandewater v. Mills*, 60 U.S.82, 19 How. 82, 89, 15 L.Ed. 554 (1857), into the law governing the interpretation of maritime lien under the Act. *Piedmont*, 254 U.S. at 12, 41 S.Ct. at 4. Because the maritime lien under 46 U.S.C.§ 971 is secret and may operate to the prejudice of prior mortgagees and other creditors without notice, it will not be "extended by construction, analogy or inference." *Id.; See also W.A. Marshall & Co. v. S.S. "President Arthur"*, 279 U.S. 564, 568, 49 S.Ct. 420, 421, 73 L.Ed. 846 (1929); *Bankers Trust Co.*, 93 F.2d at 459; *Bellingham Nat. Bank*, 587 F.Supp. at 28-29.

The facts and posture of the instant action parallel those found in *Piedmont*. In each case a materialman provided bulk supplies—coal in *Piedmont*, containers here—in circumstances where the final allocation of supplies, to any vessel of the group intended to be supplied, was left to the discretion of the procuring authority. Although, in both cases, it was understood that the supplies provided would predominantly be put to maritime use, in neither case was there any evident attempt to designate any individual vessel to receive any identifiable component of the supplies.

Appellees vainly attempt to distinguish *Piedmont*. First, they contend that their ability to identify precisely which containers were carried on board the "C.C. San Francisco" at which time adequately answers the concern in *Piedmont* over the grant of equally proportional liens against each of the vessels in the group that received coal. However, this is simply not a distinguishing characteristic. The *Piedmont* holding was not made contingent on the district court's inability to establish the exact amount of coal used by a particular vessel in the group. Rather, the defect was in the unstructured character of the contractual arrangements for the supply of coal to the *Piedmont* vessel group. *Piedmont*, 254 U.S. at 13, 41 S.Ct. at 4.

Second, appellees argue that the fact that the coal supplied in *Piedmont* was found to have been partially consumed in the owner's dockside factory instead of in vessels potentially subject to maritime liens is a distinguishing characteristic. While the Supreme Court did note that it was concerned about the potential for nonmaritime use of coal supplied to the owner's dock, *see Piedmont,* 254 U.S. at 13, 41 S.Ct. at 4, a similar problem is presented here by the potential for "inter-modal" use of containers. In an attempt to cure this deficiency, the district court granted maritime liens only to the extent that containers were the "functional equivalent of the hold" of the "C.C. San Francisco." However, under the leasing agreements entered into with CC Line, none of the appellees restricted the "inter-modal" use of their leased containers to exclusively maritime conveyance. Thus, despite the district court's holding below, it cannot be gainsaid that nonmaritime use analogous to that in *Piedmont,* was permitted under the container leasing agreements in issue here.

Finally, it is particularly instructive to compare the similarity in the reasoning supporting the holdings of both the district court in *Piedmont* and the district court in this action. The *Piedmont* district court, in its attempt to justify a broad interpretation of the "furnishing" requirement, stated:

> "As supplies for fleets of vessels under a common ownership and management in the ordinary course of business are contracted for in view of the general requirements of the entire fleet, as supply men will thus be called upon to furnish supplies in advance of the arrival of the vessels, as at the time supplies are ordered there may be uncertainty as to which vessel may require them and use them, *the statute should receive a construction which will make it applicable to and consistent with modern business conditions.* A supply man who furnished supplies ready for any vessel of a fleet that may call for it should not be deprived of the same right to a lien as a supply man who is told the name of the vessel which is to require the supplies."

240 F. 147, 153 (D.R.I.1917) (emphasis added). The district court in this action similarly stated that

> "In light of today's shipping practices [the bulk leasing of containers], defendant's contention that a container need be furnished to a specific vessel, rather than to a fleet of vessels, in order for a valid maritime lien to exist, is highly impractical."

Flexivan, 628 F.Supp at 1079 (emphasis added).

Like the Supreme Court in *Piedmont*, we are not persuaded that "modern business conditions" in the shipping industry are sufficient justification to expand the "furnishing to any vessel" requirement of 46 U.S.C. § 971.[4] Accordingly, we hold that cargo containers leased in bulk to a time-charterer of a group of vessels for unrestricted use on board the vessels in that group, are not furnished to any particular vessel of the group, on which they subsequently happen to be employed, within the meaning of 46 U.S.C. § 971.

We reverse the order of the district court with respect to the establishment of maritime liens under the Federal Maritime Lien Act, 46 U.S.C. § 971. This cause is remanded to the district court for further proceedings as may be necessary to discharge the lien.

Reversed and remanded.

J. BLAINE ANDERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues that the district court had admiralty jurisdiction over the contracts and that the cargo containers are necessaries under the Federal Maritime Lien Act. Also, I agree

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[4] Appellees' contention that there is no substantive difference between a container company leasing 10 containers to steamship company A, pre-allocating them only for use on a group of 5 specified vessels, and that company leasing 10 other containers to steamship company B, without pre-allocation but where the containers actually were carried aboard five vessels, misses the mark. We are presented with a question of interpretation of the statute and under a narrow interpretation of "furnishing," in neither case would a maritime lien likely attach. The relevant comparison is between companies A & B and a company C which leases an identified set of containers specifically for use on a named vessel.

that the container leases were entered into by a party authorized to support a lien on the vessel "C.C. San Francisco."

With respect to the holding that the containers were not furnished to the vessel "C.C. San Francisco" in particular, however, I disagree with the majority. In my view, the containers were "furnished" to the vessel under 46 U.S. § 971 in a manner sufficient to attach a lien. The majority finds a restrictive reading of the "furnishing . . . to any vessel" requirement is supported by inferential Congressional intent and prior cases interpreting section 971. For me, these two bases are not persuasive. The active and not passive language used in the statute is not a distinction which supports the inference that Congress intended a restrictive reading when viewed against the purpose of the Act. Also, previous cases interpreting section 971 support a broader interpretation of the furnishing requirement.

The purpose behind the Act, as amended in 1971, was as a matter of equity to protect suppliers who in good faith furnish necessaries to a vessel. *See,* H.R.Rep. No. 92-340, 92nd Cong., 1st Sess. 1, *reprinted in* 1971 U.S.Code Cong. & Ad.News 1363-1365; *Equilease Corp. v. M/V Sampson,* 793 F.2d 598, 603 (5th Cir.1986) (en banc) ("The statute [46 U.S.C. § 971] was intended to encourage private investment in the maritime industry. We will not begin now to defeat the purpose of the Act by layering technicalities onto its interpretation"). If the purpose of the Act is to be fulfilled, the construction of the "furnishing . . . to any vessel" requirement should not be a restrictive one. The majority's restrictive interpretation is contrary to the purpose Congress expressed when it amended the Act. In this, the majority places reliance for its holding upon the fact that the verb "to furnish" is active and not passive. I find this distinction to be of little weight. While use of the active voice may create an inference of Congressional intent, such an inference should be decidedly subordinate to Congress' stated purpose. *See Gulf Trading and Transportation Co. v. M/V Tento,* 694 F.2d 1191, 1194 (9th Cir.1983).

I also find the cases cited by the majority to be inapposite. The question presented is: "Is it a condition precedent to a lien that containers which have been leased to managers of a fleet of

container vessels also must have been specifically set apart for use on the particular vessel against which a lien is asserted?" The answer has already been provided and the answer is "no." In *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920), the Court stated:

> [T]he fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owner under a single contract . . . each vessel so receiving supplies may be made liable for the supplies furnished to it.

Id. at 10-11, 41 S.Ct. at 4 (citations omitted). The majority's reliance on *Piedmont* is misplaced. In *Piedmont,* delivery was not made to the vessels but to another location, the owner's factory. The parties understood that the owner would be dividing the supplies (coal) between the factory and the vessels. Title to the supplies passed to the factory as an entity before the supplies were divided for vessel and non-vessel usage. *Piedmont* is therefore clearly distinguishable on this ground.

Here, there is no question the lessor presented the containers to CC Line for use by the vessels. The containers were not diverted, after the passing of title to another entity, for non-vessel use. That the CC Line had the authority to interchange the containers between particular vessels is of no consequence since "each vessel so receiving supplies may be made liable for the supplies furnished to it." *Piedmont* at 11, 41 S.Ct. at 4.

Later, in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 1197 (1940), the Court interpreted *Piedmont* as permitting a lien to attach, in that the supplies were "furnished," where delivery was made to a number of vessels since the supplies were presented exclusively for the vessels in question. *Dampskibsselskabet* at 277, 60 S.Ct. at 94. From this it is clear that a contract for delivery of supplies to a number of vessels without designation of particular vessels will not cause a maritime lien to fail under section 971 for want of

"furnishing . . . to any vessel" as long as there is no diversion of title to an intermediate entity.

The additional cases cited by the majority err for the same reason the majority opinion does. They read *Piedmont* too narrowly. The controlling feature of *Piedmont* is not the result reached but the principle stated. *Piedmont* and its progeny allow a lien to attach to a particular vessel, even though the supplies were not delivered to a prespecified vessel, if the vessel in fact received the supplies furnished.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 85-6351
CV No. 84-6289-JWC

Foss Launch & Tug co. and Port Angeles Pilots Assn.,
Plaintiffs,

and

Transamerica I.C.S. Inc. and Nautilus
Leasing Services, Inc.
Plaintiffs-Appellees,

v.

Char Ching Shipping U.S.A., Ltd., et al.,
Defendants,

and

Char Yigh Marine Panama, S.A.; and
M/V C.C. San Francisco, in rem,
Defendants-Appellants.

[Filed April 23, 1987]

ORDER

Before: GOODWIN, WALLACE and ANDERSON, Circuit Judges

Judges Goodwin and Wallace have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Anderson would grant the petition for rehearing and allow the suggestion for en banc rehearing.

The full court was advised of the suggestion for rehearing and no active judge called for a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix D

Flexivan Leasing, Inc., Genstar Container Corporation, Interpool Limited, Itel Containers International Corporations, Nautilus Leasing Services, Inc. and Transamerica ICS. Inc., Plaintiffs,

v.

M/V C.C. San Francisco, her engines, tackle, apparel, furniture and fixtures, in rem, Defendants,

The Vessel C.C. San Francisco,
Garnishee.

Nos. CV 84-6331-JWC, CV 84-6175-JWC,
CV 84-6243-JWC and CV
84-6289-JWC.

United States District Court,
C.D. California.

Aug. 20, 1985.

ORDER RE PLAINTIFFS' SUMMARY JUDGMENT MOTION TO ESTABLISH MARITIME LIEN

CURTIS, District Judge.

INTRODUCTION

On July 1, 1985, in response to defendant Char Yigh Marine (Panama) S.A.'s Kenoticed Motion to Compel Plaintiffs *In Rem* to Justify Maritime Arrests, this Court found that the *in rem* arrests of the vessel "CC San Francisco" by the container lessor plaintiffs were colorably valid, thereby validating this Court's continued admiralty jurisdiction over the claims. The Court therefore ordered the matter to proceed, and requested that the container claimants submit motions for summary adjudication

under FRCP 56 as to all issues regarding the *in rem* claims which are not subject to substantial controversy.

The Court now has before it summary judgment motions brought by the container claimants seeking to establish, as a matter of law, that the containers provided to "CC Lines" give rise to maritime liens. This opinion governs the motions of Flexi-van Leasing, Inc. (CV 84-6331), Genstar Container Corporation (CV 84-6175), Interpool Limited (CV 84-6243), Itel Containers International Corporation (CV 84-6175), Nautilus Leasing Services, Inc. (CV 84-6289), and Transamerica ICS, Inc. (CV 84-6289). Although the facts and contracts relied upon differ slightly from case to case, they each present this same question of law. Rather than discussing the specific facts of each case, this order respectively adopts and incorporates by reference the Statements of Uncontroverted Facts and Conclusions of Law submitted concurrently by each of the container claimants with their motions.

DISCUSSION

In this *in rem* action, plaintiffs seek to confirm that they have maritime liens for necessaries based on containers furnished to the vessel "CC San Francisco." Plaintiffs further seek to establish that the lien encompasses all periods the containers served as the "functional equivalent" of the vessel's hold, including incidental land uses.

The governing statute is the maritime lien statute, 46 U.S.C. § 971. It provides:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

The first requirement for a maritime lien under § 971 is that the container or equipment be a "necessary." A "necessary" is any

item furnished to a vessel which is reasonably necessary for the venture in which that particular ship is engaged. *Clubb Oil & Tools, Inc. v. M/V George Vergottis,* 460 F.Supp. 835, 841 (S.D.Tex.1978). Containers are portable receptacles in which large numbers of smaller packages may be transported. They are the modern substitute for the hold of the vessel. *Leather's Best, Inc. v. Mormaclynx,* 451 F.2d 800, 815 (2nd Cir.1971). It is clearly established that containers are necessary to a container ship's operation. *Nautilus Leasing Services, Inc. v. M/V Cosmos, et al.,* 1983 AMC 1483 (S.D.N.Y.1983); *Transamerica ICS, Inc. v. M/V Panatlantic,* 1984 AMC 489 (S.D.Fla.1983). Since the "CC San Francisco" carried only containerized cargo while in the service of the "CC Line," containers were more than reasonably necessary for her operation.

The second requirement, and the one around which this controversy is centered, is that the containers be "furnished to" the "CC San Francisco." It is undisputed by the parties that the containers were supplied by the container claimants to "CC Lines" for use in its transpacific shipping service between various ports in the Far East and the West Coast of the United States.

However, because the containers were not supplied to the "CC San Francisco" specifically, defendant argues that the "furnishing to any vessel" requirement has not been met. Plaintiffs, on the other hand, submit that by furnishing containers to "CC Lines" for exclusive use on board its fleet of container vessels, and by virtue of their actual use on board the "CC San Francisco," plaintiffs furnished containers to the vesssel within the meaning of 46 U.S.C. § 971. The Court agrees with plaintiffs.

The use of containers in shipping has been characterized as "one of the most important technological developments in the transportation of goods by sea since steam replaced sail." Simon, *The Law of Shipping Containers,* 5 J.Mar.L. & Com. 507 (1974). *See also CTI-Container Leasing v. Oceanic Operations,* 682 F.2d 377, 380 (1982). The Supreme Court has recognized how containerization has revolutionized maritime cargo-handling techniques, noting that

> "containerization permits the time-consuming work of stowage and unstowage to be performed onland in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower required to get the cargo onto the vessel."

Northwest Marine Terminal Co. v. Caputo, 432 U.S. 249, 270, 97 S.Ct. 2348, 2360, 53 L.Ed. 320 (1977) (footnote omitted).

One of the key advantages of containers is that they allow the use of several different modes of transportation—marine, motor, rail, or air—to transport goods on a door to door basis. *See* Tombari, *Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry,* 10 J.Mar.L. & Com. 311 (1979). As the evidence in this case indicates, containers are routinely leased by shipping lines without specification as to the exact vessel on which they may be used. In fact, a container can be used on several different vessels during the duration of its lease. In light of today's shipping practices, defendant's contention that a container need be furnished to a specific vessel, rather than to a fleet of vessels, in order for a valid maritime lien to exist, is highly impractical. In addition, and most importantly, it is unsupported by the law.

The delivery of necessaries to a fleet of vessels gives rise to a maritime lien to the extent the necessaries in fact were placed on individual vessels in the fleet. Moreover, those necessaries can be supplied to a fleet pursuant to a single contract. *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California,* 310 U.S. 268, 276-77, 60 S.Ct. 937, 941-42, 84 L.Ed. 1197 (1940); *Brock v. SS Southhampton,* 231 F.Supp. 280, 282 (D.Ore.1964); *Jeffrey v. Henderson Bros., Inc.* 193 F.2d 589, 593-94 (4th Cir.1951). In *Transamerica ICS Inc. v. M/V Panatlantic,* 1984 A.M.C. 489 (S.D.Fl.1983), the court found that defendant's vessel's containers were "necessaries," and also noted that the requirement that such necessaries be "furnished to" a vessel does not require direct delivery on the basis of separate contracts for each vessel. The court stated:

> "After reviewing the history and operation of the container leasing business as explained by plaintiffs, the Court is

> convinced that containers are "necessaries" within the meaning of 46 U.S.C. sec. 971. Furthermore, for purposes of creating a valid maritime lien, it may not be essential, and indeed may not be desirable, that the container be delivered directly to the vessel, be sold rather than leased, or be earmarked for a particular vessel. . . . [T]he Supreme Court has noted how the courts and Congress have accommodated maritime law to modern cargo-handling techniques. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 268-72, 97 S.Ct. 2348, 2359-61, 53 L.Ed.2d 320, 1977 AMC 1037, 1051-55 (1977)."

In light of the above authority, and consistent with modern shipping practices, the Court holds that the delivery of containers to a fleet of vessels, without specification as to a specific ship, does not defeat a maritime lien where the actual use of those containers aboard a specific ship can be proved.

Defendant also raises several additional arguments as to why plaintiffs should be denied their maritime lien. Suffice it to say, however, that at oral argument, defendant admitted that its main legal argument concerns lack of delivery to a specific ship, and that the rest of the arguments raised were "fluff." Thus, without going into the specifics of those arguments for purposes of their rejection in this opinion, the Court hereby holds (1) that the plaintiffs' container leases with "CC Line" are maritime contracts; (2) that plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco" and are therefore "necessaries" within the meaning of 46 U.S.C. § 971; (3) that plaintiffs "furnished" containers to the "CC San Francisco" within the meaning of 46 U.S.C. § 971; (4) that plaintiffs have valid maritime liens for necessaries against the vessel "CC San Francisco" for all containers carried aboard that vessel; and (5), that the maritime lien encompasses all periods plaintiffs' containers served as the functional equivalent of the hold of the "CC San Francisco," including incidental land use. Proof of plaintiffs actual damages under their maritime liens await further proceedings.